IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5881 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KAUSHIK BHOLABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5881 of 2003

MR SAURIN A SHAH for Petitioner No. 1

MR PR NANAVATI for Petitioner No. 1

MR AD OZA PP for Respondent No. 1

MR BB NAIK & MR RAJESHWAR J DAVE for Bank

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 26/12/2003

CAV JUDGEMENT

Rule. Mr. A.D. Oza, the Ld. P.P. for the State, Mr. B.B. Naik, learned advocate for The Visnagar Nagrik Sahkari Bank and Mr. Rajeshwar Dave, learned advocate for the Depositors' Association waive service of rule.

2. The applicant has approached this Court under the provisions of Section 439 of the Code of Criminal Procedure, 1973 (for short 'Cr. P.C.') for securing his release on bail during the pendency of his trial before the concerned Court. He is in the custody since 22/10/2002 in connection with the offence registered at C.R. No. I-452 of 2002 at Naranpura Police Station, City of Ahmedabad. He is alleged to have committed offences made punishable under sections 167, 406, 409, 420, 467, 468, 477 read with section 120B of the Indian Penal Code and section 46 of the Banking Regulations Act. There are 15 other accused named in the F.I.R. of this case and all except one, namely Bholabhai Chaturdas Patel, father of the present applicant, are already released on bail by this Court.

2.1. Initially the present applicant had approached this Court by filing application u/S. 438 of the Cr. P.C. being Misc. Criminal Application No. 7244 of 2002, which was withdrawn after extensive hearing on 21/10/2002. Thereafter, application u/S. 439 of the Cr. P.C. being Misc. Criminal Application No. 9052 of 2002 was filed before this Court praying for bail during pendency of investigation and the trial. However, before the said application could be taken up for hearing, charge-sheet was submitted by the Investigating Officer in the concerned Court and hence the same was withdrawn with the Court's permission vide order dated 7/2/2003 without there being any effective hearing. Subsequently i.e. after the Sessions Court dismissed the application filed by the applicant and other accused of this case u/S. 439 of the Cr. P.C., another application by the present applicant being Criminal Misc. Application No. 1759 of 2003 was filed before this Court which was dismissed by C.A.V. order dated 13/5/2003, against which Special Leave Petition was preferred before the Apex Court which also was rejected. Now the applicant has again approached this Court by filing the present application on the ground that after rejection of the earlier matter i.e. Criminal Misc. Application No. 1759 of 2003 certain developments have taken place which can be termed as "changed circumstances" requiring release of the applicant on bail.

3. The facts leading to the arrest of the applicant

in nutshell can be stated as under :-

3.1. The Visnagar Nagrik Sahkari Bank (hereinafter referred to as 'the Bank') is a cooperative Bank incorporated and registered under the Gujarat Cooperative Societies Act, 1961, having its head office at Ganj Bazar, Market Yard, Visnagar in Mehsana district. This Bank has 13 branches in Mehsana district as well as in the city of Ahmedabad. The apex body of the Bank is Board of Directors. The present complaint pertains to period between March 2000 and 13th August, 2002 during which the applicant was on the Board of Directors. Applicant is from Unja branch.

3.2. One Madhusudan Chhotalal Shah, who at the relevant time was working as the Manager of Usmanpura Branch of the Bank at Ahmedabad, lodged complaint/FIR with the Naranpura Police Station stating therein that the Directors of the Bank in collusion with several borrowers had committed grave illegalities and irregularities in the matter of disbursement of loans and had thereby completely upset the financial soundness of the Bank, which had ultimately resulted into the dissolution of Board of Directors with effect from 13th August, 2002 and closure of the Bank. He has further stated that all the erstwhile Directors including the present applicant had entered into a conspiracy to dupe the Bank and for that purpose they, in collusion and in conspiracy with the borrowers, had committed acts of forgery, cheating and also misappropriation of the funds of the Bank. He has further stated that while advancing loans to such borrowers the requisite formalities prescribed under the banking laws and the Gujarat Cooperative Societies Act and also the prescribed procedure of the Bank were not followed; that adequate securities were not obtained and without ascertaining the financial position of the parties, loans of huge amounts had been advanced to them. The complainant has specifically referred to 16 instances wherein the total amount of loans worth Rs.250 crores has been disbursed without following the due procedure. According to him, the Board of Directors had not taken care to see whether the applications of the intending borrowers were routed through proper channel and that all the necessary documents required for the purpose of ascertaining the credentials of the intending borrowers were checked. Further that no attempt had been made even to find out whether the intending borrower was a genuine persons and whether he possessed adequate securities to be given against loan and his repayment capacity. It is alleged that in many cases even the loans of large amounts were

advanced to fictitious persons and to persons who were merely employees of the big companies, drawing salary of meagre amount. All these transactions pertained to the Usmanpura Branch of the Bank. According to the complainant, these questionable loans have been advanced to the concerns with which the then Chairman of the Bank Mr. Bholabhai Patel and his son Mr. Kaushikbhai Patel had close associations and wherein their considerable interest was involved and the other Directors had conspired with them in committing these offences. According to him, these loans have not been repaid despite expiry of stipulated time for repayment and the defaults have been completely overlooked by the Board of Directors.

3.3. On receipt of the complaint, the police registered offence against the Chairman of the Bank, namely Mr. Bholabhai Chaturdas Patel and 15 others who were Directors of the Bank during the relevant period and commenced the usual investigation. In course of the investigation, the applicant has been arrested on the aforesaid date.

4. Mr. Saurin Shah, learned advocate appearing for the applicant has submitted mainly three grounds, namely that on earlier occasion when the applicant was put a definite query by the court whether he was willing to repay the outstanding amount and the reply was that there was no question of repaying the same and the matter had been argued on the principles of bail. However, the applicant is now ready and willing to clear the entire outstanding amount if some facility of repayment by way of instalments is granted to him. Incidentally, with regard to the issue of repayment, Mr.Shah has submitted that the applicant also assures this Court that he will make all the efforts to see that the borrowers, who have obtained loans from the Bank at his instance, will clear their dues as early as possible and he will not spare any effort to see that whatever damage that has been caused to the Bank is set right to the maximum possible extent. He has further submitted that after the rejection of his application u/S. 439 on merits, the family of the applicant has suffered many difficulties including the critical condition of his father who is at present hospitalized on account of a serious heart ailment. According to the applicant, it was the applicant's sister who uptill now looked after the father, being only main person available in the family, who could take such care. However, she herself is now facing serious health problem because she has been suspected of suffering from bone cancer and she is required to be at Mumbai for treatment.

He has further submitted that because of the disturbed family affairs, his son has also gone astray. He uptill now had a brilliant academic career, has totally neglected his studies and he has taken to undesirable way of living which was matter of great concern for the family. He has also stated that a further difficulty has been created by the death of applicant's uncle, who was alleged to have been involved in the present Bank scam and while in custody he committed suicide. This incident has provoked the feelings of his uncle's family members and they are now almost on enimical terms with the applicant's family as they feel that the root cause of the entire episode was the father of the applicant and the applicant himself. It is further submitted that on the last occasion, one of the grounds on which the application was turned down was that investigation against the borrowers was still in progress. However, out of owners of 21 concerns, the owners of 11 concerns are already arrested and some have been left out because, according to the Investigating Officer, they have left the country. In that view of the matter, the applicant is now required to be released on bail. Mr. Shah also tried to advance submissions on the merits of the case to show that his involvement in the offence was not there but he was prevented from doing it as they were already considered and decided against the applicant by this Court at the time of hearing the earlier bail application.

4.1. This application has been vehemently opposed by Mr. A.D. Oza, Ld. P.P. appearing for the respondent State, Mr. Rajeshwar Dave and Mr. B.B. Naik, Ld. Advocates appearing for the Visnagar Cooperative Bank and the Depositors' Association respectively. The common objection that has been raised by them is that the circumstances which prevailed at the time when the earlier application was rejected have not undergone change and at present this application cannot be granted especially when investigation against some of the borrowers is still going on. They have further submitted that after committing such large scale misappropriation if the applicant is granted bail, it will have bad repercussions on the society. They have further submitted that considering the fact that on earlier occasion this Court had observed that the applicant is likely to tamper with the witnesses, the said apprehension still continues and in the circumstances, it is not desirable that the applicant be released on bail.

5. Having perused the record of this application and other material produced on record and having given

careful consideration to the rival submissions, it is clear that the applicant has been involved in a serious case wherein large scale Bank fraud is said to have been committed by the applicant and his co-accused. As a result of the same, the said Bank has now drawn its shutters down resulting into loss of hard earned moneys of the hundreds of depositors and at present the fate of such deposits is not certain. However, certain aspects which are now required to be considered are whether the applicant should be kept in custody for indefinite period and if such detention is made, whether it would amount to a punishment of imprisonment without trial? Secondly, whether the release of the applicant would help to restore the financial stability of the bank atleast to some extent or that it would hamper the case of the prosecution and lastly whether considering the family circumstances, it will be desirable, on humanitarian ground, to release the applicant on bail.

6. The say of the applicant is that the outstanding dues against him as on today is Rs.1,29,71,742/= and if the reasonable instalments are granted, he is ready and willing to repay the entire outstanding amount. It is to be noted that the outstanding amount is quite substantial and when such willingness is shown, it would, in my opinion, improve the financial position of the Bank atleast upto some extent. When initially, alongwith the present applicant other Directors of the Bank had filed applications, their applications were allowed solely taking into consideration their readiness and willingness to repay the entire amount outstanding in the names of those applicants and their very close relatives who had received financial benefits at the instance of those applicants. Similarly, when that willingness is now shown by the applicant it can be termed as a factor in favour of the applicant which can be taken into consideration while deciding this bail application. In the case of Kalpesh Dineshchandra Jariwala v. The State of Gujarat reported in (2003) 1 G.H.J. at page 387, accused's willingness to repay the defalcated amount is considered to be a factor in favour of the accused while deciding his bail application.

7. The second aspect which is now required to be considered is whether pending the investigation against the borrowers, he should be released on bail. It may be noted here that the applicant is in the custody since 22/10/2002. The last application filed by the applicant u/S. 439 of the Cr.P.C. was rejected, as stated above, vide order dated 13/5/2003. At that time the argument was advanced on behalf of the State that the

investigation against the borrowers was not over and, therefore, it was not desirable to release him on bail. It is almost seven months thereafter, the same argument is now being advanced on behalf of the State. The investigation in this case and its allied cases is going on for well over one year. Even after the rejection of the last application, seven months have elapsed. The investigation, as per the say of the Ld. P.P., has not made substantial progress, which according to him, is due to certain reasons, which have been enumerated in the affidavit filed by the Investigating Officer. It is stated in the said affidavit that there is voluminous record involved in this case, which requires detailed investigation; secondly that certain accused are absconding and are not apprehended and thirdly that since the Investigating Officer is required to attend the Court proceedings in connection with this case, it is causing delay in the investigation. The fact remains that for almost one and half year of filing of the F.I.R. in present case and its off-suits, the investigation is not complete. It clearly appears that the process of investigation is very tardy. I am informed that for the lethargy on the part of the Investigating Officer of the present case, even the Depositors Association has filed a petition before this Court being Special Criminal Application No. 270 of 2003 for obtaining appropriate orders from this Court for change of investigating agency. If this is the state of investigation, no fault can be found with the present applicant, who has surrendered to the custody way back on 22/10/2002. Merely because some accused are still absconding and the investigating agency is not able to apprehend them, it is unfair to detain the applicant on that ground, especially when he has chosen to surrender to the custody at the earliest. When the earlier application was heard, I was told that the investigation would be over within reasonable time and that was the precise submission made by the State. However, even after lapse of seven months, the investigation against the borrowers is still not over and the reason clearly appears to be indifferent attitude on the part of investigating agency which has even prompted the depositors' association to move this Court for change of investigating agency. If the investigation is not completed within reasonable time, the investigating agency has to thank itself and for the purpose of deciding the bail application, which is again submitted after a lapse of seven months, can now be considered keeping in view the indifferent attitude of the investigating agency.

7.1. In the decision rendered by the Apex Court in the

case of State of Maharashtra v. Nainmal Punjaji & Anr., reported in 1969 (3) S.C.C. at page 904, it has said that even in case of extra ordinary nature, it is impossible to say that no bail should be granted to the accused during pendency of the whole investigation. This decision will apply to this case on all the aspects. There is considerable delay on the part of investigating agency. The end of investigation nowhere seems to be in sight even after one year and four months. There is apprehension expressed regarding applicant leaving the country or in any other manner absconding. On the contrary, he surrendered to the custody immediately after rejection of his bail application under Section 438 of Criminal Procedure Code. So for the apprehension regarding tampering with the witnesses is concerned, it has been discussed separately in this order. When these factors favoured the accused, in the opinion of the Apex Court, he is required to he released on bail, despite incomplete investigation in the case having extra ordinary nature.

7.2. So far the tampering with the witnesses is concerned, if the said conclusion was drawn by this Court on account of the statements which have been given by some of the employees of the Bank while the investigation of this case was on. They have simply stated that at the time of advancement of loans when they insisted for the compliance of the procedure, the present applicant as well as his father - the Chairman of the Bank, alleged to have stated to them that they had i.e. the said employees to abide to the commands of the applicant and his father as because of them, they were earning the bread and if they were dismissed from the service, no-one would re-employ them at such advanced age. In light of these statements, it was apprehended that the applicant may pressurise the borrowers who were under his obligation and hamper the course of investigation. However, when borrowers of about 11 concerns are already apprehended, in connection with them, no such tampering can be expected. Moreover, as stated above, when the investigating agency itself has remained indifferent to this aspect and has not completed the investigation within reasonable time, it now cannot be expected to raise the said contention again. This factor also tilts the balance in favour of the applicant.

7.3. Lastly, the family circumstances, which have been pleaded by the applicant before this Court require some consideration. It is an admitted fact that the applicant's father, namely Bholabhai Patel, who is also an accused of this case, is suffering from serious heart ailment. In fact, some time earlier he was taken to

Apollo Hospital at Chennai for heart by-pass surgery. Now with the recent medical certificates issued by different reputed hospitals including that of Apollo Hospital at Chennai and produced by the applicant, show that the surgery has not made much improvement in his health and the condition of the applicant's father has now become critical. Though he is not released on regular bail, he is granted temporary bail and he is hospitalized. Some time back he was taken to Chennai for re-examination by Dr. Kelikar, who had performed the by-pass surgery and who has now opined that another surgery is not possible and he should be kept under constant surveillance of eminent Cardiologist. For that precise reason, he is now being hospitalized in a hospital of repute of the City of Ahmedabad, viz. SAL Hospital. So far the question regarding attending to the ailing patient is concerned, according to the applicant, he is the only son of his father. Uptill now in his absence, his sister was taking the care of the ailing patient, but she is afflicted with serious disease, viz. bone cancer and her own health has become critical. In view thereof, there is no-one in the family, who can take care of the said patient. Considering the fact that the father of the applicant is suffering from serious heart ailment, it is desirable that he is attended by a close relative and when there is no such relative now available in the family, the release of the applicant on that ground can also be taken into consideration. So far the availability of family members for taking care of Bholabhai Patel is concerned, the contention of the applicant is not seriously opposed. However, it has been submitted by the Ld. P.P. that the patient can be as well treated in prison. Since he is to be kept under constant surveillance of Cardiologist, the same thing can also be done by keeping him in a Civil Hospital at Ahmedabad. However, when the medical certificates indicate the seriousness of the condition of the patient, it is normally desirable that he should be allowed to take best of the medical care, which in the opinion of the relatives of the patient can be made available to the patient and for that purpose, if he is required to be kept in the aforesaid hospital within the city of Ahmedabad, i.e. within the gaze of Investigating Officer, it may not cause any harm to prosecution's case. In such circumstances, if the applicant is allowed to stay with his father, it will not only give him the required assistance and attention but also give him moral courage and support during his serious illness. It may also not be forgotten that other family disturbances which have been narrated above may as well disturb the mental condition of the aging and ailing father of the

applicant. If in such circumstances, some solace is extended to him by release of the applicant on bail, it would grant him great comfort and may even possibly help the speedy recovery. This humanitarian ground may also slightly tilt the balance in favour of the applicant vis-a-vis the apprehension shown by the learned counsels for the respondents with regard to applicant's tampering with the witnesses. In my opinion, at present, except for the aforesaid statements, nothing else has been brought on record to substantiate this apprehension. However, even that aspect also can be taken care of by imposing certain conditions on the applicant.

8. It is submitted by the respondent that in case the Court is desirable of granting the application, it may direct the applicant to stay outside Ahmedabad. This submission of the respondent cannot be accepted for two reasons, namely, that amongst other grounds, the applicant is also being released on bail on account of his family circumstances including the ill-health of his father. If he is directed to remain outside, the purpose of releasing him on bail on this ground will be totally frustrated. The second reason is that it is an undisputed fact that all the working places of the applicant are situated within the City. It is, therefore, desirable that he attends to his work which will generate some income which may enable him to fulfill his commitments towards the Bank. If he is required to stay away from City, there is all possibility that he may not be able to generate sufficient income so as to comply with aforesaid directions with regard to repayment of the loans.

9. In view of the aforesaid changed circumstances, in my opinion, this application is required to be granted and the applicant deserves to be released on bail in connection with C.R. No. I-452 of 2002 registered at Naranpura Police Station, Ahmedabad. The applicant is, therefore, ordered to be released on bail on the following conditions :-

I. that the applicant shall furnish bail of Rs.1,50,000/= (Rupees One lac Fifty thousand only) with solvent surety of the like amount in the trial Court,

II. that the applicant shall repay the entire outstanding amount of Rs.1,29,71,742/= in the following manner :-

a. after his release on bail, he will pay the first instalment of Rs.9,71,742/= [Rupees nine lacs

seventy one thousand seven hundred forty two only] on or before 5th day of his release on bail. The remaining amount of Rs.1,20,00,000/= [Rupees one crore twenty lacs only] shall be paid by equal monthly instalment of Rs.10 lacs, which he will deposit in the Bank between 1st and 5th day of each month thereafter.

b. that any default committed on this aspect shall entitle the investigating agency to move an application for cancellation of the bail.

III. that he will make all sincere efforts to see that the dues outstanding in the names of different borrowers are repaid to the Bank at the earliest.

IV. that he will mark his presence thrice in a week i.e. on every Monday, Thursday and Saturday at Naranpura Police Station between 9.00 a.m. and 12.00 noon,

V. that he will not enter into the premises of the head office of the Bank or any of the branch offices of the Bank situated in the City of Ahmedabad and outside the City till the commencement of the trial,

VI. that he will not to try to tamper with or pressurize the prosecution witnesses or complainant or hamper the course of investigation in any manner;

VII. that before leaving the City of Ahmedabad, but not the State of Gujarat he shall obtain prior permission of the Investigating Officer,

VIII. that during the aforesaid stipulated time i.e. the period of 12 months the applicant shall also clear all the bank guarantees;

IX. that he shall extend full co-operation to the investigating agency in investigation.

These conditions are over and above the usual conditions which are as follows :-

a) not take undue advantage of his liberty or abuse his liberty;

b) not to try to tamper or pressurize the prosecution witnesses or complainant in any manner;

c) maintain law and order and should cooperate the investigating officers;

d) not act in a manner injurious to the interest of the prosecution;

e) not leave the local limits of State of Gujarat without the prior permission of the concerned

Sessions Judge.

f) furnish the address of his residence to the I.O. and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;

g) surrender his Passport, if any, to the lower court within a week.

It is made clear that breach of any of the aforesaid conditions would entitle the investigating agency to file appropriate application praying for cancellation of the bail.

For compliance with the aforesaid conditions, an undertaking dated 20/12/2003 has been filed on oath by the applicant as directed by this Court, which is ordered to be taken on record.

10. It is also submitted by the Ld. P.P. that in the event of the release of the applicant on bail, this Court may stay its order for a period of six weeks to enable the State Government to approach the higher forum. The request appears to be reasonable. However, for the time being this order is stayed for a period of four weeks and in the meanwhile the State Government, if it so wishes, can take appropriate step to challenge this order before the Apex Court.

This application is, therefore, allowed. Rule is made absolute. Direct service is permitted.

[AKSHAY H. MEHTA, J.]

* Pansala.